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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DEC 10 1996

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Amendment of Part 90 of the Commission's |) | PR Docket No. 89-552 |
| Rules to Provide for the Use of the |) | |
| 220-222 MHz Band by the Private Land |) | |
| Mobile Radio Service |) | |
| |) | |
| Implementation of Sections 3(n) and 332 of |) | GN Docket No. 93-252 |
| the Communications Act |) | |
| |) | |
| Regulatory Treatment of Mobile Services |) | |
| |) | |
| Implementation of Section 309(j) of the |) | PP Docket No. <u>93-253</u> / |
| Communications Act -- Competitive |) | |
| Bidding, 220-222 MHz |) | |

To: The Commission

**JOINT COMMENTS OF INCOM COMMUNICATIONS
CORPORATION AND NARROWBAND NETWORK SYSTEMS**

Incom Communications Corporation ("ICC") and Narrowband Network Systems ("NNS"), by their attorneys and pursuant to Public Notice, FCC 96-449, released November 19, 1996, hereby jointly submit comments respecting the Commission's tentative conclusion to repeal §90.739 of the Commission's Rules (referred to sometimes hereafter as the "40-mile rule"). For the reasons stated below, ICC and NNS support the Commission's proposal to eliminate the 40-mile rule.

ICC and NNS are 220 MHz system management companies and as such have a substantial interest in the elimination of the 40 mile rule. ICC and NNS generally concur with the comments submitted in the April 5, 1996 "Ex Parte Comments of SMR Advisory Group, L.C." The 40-mile rule contained in §90.739 of the Commission's Rules no longer serves a legitimate purpose. The maturation and growth of the industry and the

Commission's proposal to adopt provisions for more flexible use of the 220 MHz spectrum, geographic-area licensing of the remaining spectrum and licensing of the remaining spectrum by competitive bidding^{1/} have served to all but eliminate spectrum warehousing, the very purpose for which the 40-mile rule was adopted. Just as the Commission determined that the 800 MHz and 900 MHz industries had matured and advanced technologically to the level where the 40-mile rule restrictions were no longer served a purpose, especially in light of the adoption of geographic licensing and competitive bidding, so must it determine with respect to the 220 MHz industry.

Currently, §90.739 of the Commission's Rules serves only to foster the disparate treatment of 220 MHz participants and to inhibit the competitiveness of this technology vis-a-vis other commercial mobile radio service ("CMRS") and private mobile radio service ("PMRS") (collectively, "land mobile") technologies, such as the cellular and the 800/900 MHz SMR industries.^{2/} Of all of the land mobile spectrum, only the 220 MHz is still subject to the 40-mile rule. 220 MHz operators must be able to aggregate channels and develop wide-area systems if they are to compete effectively with the other land mobile operators, but application of the 40-mile rule inhibits the ability of 220 MHz operators to do so, thus denying to them the economic and administrative efficiencies and economies of scale inherent in the expeditious development and operation of wide-area systems. If

^{1/} See, Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service (Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking), PR Docket No. 89-552, 11 FCC Rcd 188 (1995).

^{2/} Retention of §90.739 could also result in the disparate treatment of Phase I licensees vis-a-vis Phase II licensees, to whom the rule may not apply under the Commission's new licensing scheme for Phase II licenses (the final provisions for which have not yet been released by the Commission).


the Commission is to comply with the mandate of Congress to treat substantially similar services alike^{3/}, then the Commission must repeal §90.739 of its rules.

Finally, it appears that the 220 MHz industry as a whole supports elimination of the 40-mile rule. Comments submitted to the Commission thus far advocate elimination of the rule, and to date no party has expressed any opposition the proposal to eliminate the rule. ICC and NNS know of no participant in the industry that is in favor of the 40-mile rule.

Therefore, ICC and NNS support the Commission's tentative conclusion and, in consideration of the foregoing, respectfully urge the Commission to repeal §90.739 of the Commission's Rules.

Respectfully submitted,

INCOM COMMUNICATIONS
CORPORATION and NARROWBAND
NETWORK SYSTEMS

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December 10, 1996

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^{3/} See, Budget Act, §6002(d)(3). The Commission has determined that the 220 MHz service and the other CMRS services are substantially similar. See, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services (Third Report and Order), GN Docket No. 93-252, 9 FCC Rcd 7988, 7996 (1994).

CERTIFICATE OF SERVICE

I, Yvette King, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I have caused a true copy of the foregoing "Joint Comments of Incom Communications Corporation and Narrowband Network Systems" to be sent via hand delivery to the following on the 10th day of December, 1996:

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